

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Vonage Petition for a Declaratory Ruling)	
Preempting the Minnesota Public Utilities)	WC Docket No. 03-211
Commission's Ruling that Vonage Provides a)	DA 03-2952
Telecommunications Service and is Subject to State)	
Regulation as a Telecommunications Provider)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its initial comments in the above-captioned proceeding.² NTCA urges the Federal Communications Commission (Commission or FCC) to declare that Vonage's voice over Internet protocol (VOIP) service is a "telecommunications service" subject to access charges and universal service fund (USF) contributions.³ NTCA also urges the Commission to reconsider and remove the enhanced service provider (ESP) exemption that allows Internet service providers (ISPs) to avoid paying access charges and USF contributions. This exemption has created a regulatory arbitrage incentive for telecommunications providers to remove their traffic from the public switched telephone network (PSTN) to an Internet-based platform to avoid paying legitimate access

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of its members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). All of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of Vonage's Petition for Declaratory Ruling Preempting the Minnesota Public Utilities Commission's Ruling that Vonage Provides Telecommunications Service and is Subject to State Regulation as a Telecommunications Provider*, Public Notice, WC Docket No. 03-21, DA 03-295 (September 26, 2003).

³ Alternatively, if the Commission rules that Vonage's VOIP service is an "information service" the Commission should exercise its permissive authority under section 254(d) and require Vonage to make USF contributions.

charges and universal service contributions. Until the ISP exemption is removed, the future viability of universal service is at risk.

I. INTRODUCTION

On September 22, 2003, Vonage filed a petition for declaratory ruling requesting that the Commission preempt the Minnesota Public Utilities Commission's (MPUC) ruling that Vonage is providing a "telecommunications service" and therefore is subject to state regulation as a telecommunications provider.⁴ Vonage claims that its VOIP service is an "information service" and therefore not subject to state or federal regulation as a "common carrier" or "telecommunications carrier" under Title II of the Act.⁵ Vonage is wrong. The Commission should therefore deny the petition and declare Vonage's VOIP service a "telecommunications service" subject to Title II regulation.

II. VONAGE'S VOIP SERVICE IS A "TELECOMMUNICATIONS SERVICE"

Vonage holds itself out as provider of voice telephone service that allows its customers to use a standard touchtone telephone to make calls to any telephone number assigned in accordance with the North American Numbering Plan.⁶ The Vonage VOIP service provides a virtual transmission path between any combination of two local loops – ILEC, CLEC, cable or satellite loops - to originate and terminate voice telephone calls anywhere on the Vonage network or on the PSTN. Notwithstanding the fact that a Vonage customer must have a cable, satellite or DSL modem connection, an ISP, MTA router,⁷ and in most instances a standard

⁴ *In the Matter of Vonage's Petition for Declaratory Ruling*, WC Docket No. 03-2952, (Vonage Petition)(filed Sept. 22, 2003).

⁵ *Id.*, p. 24.

⁶ Vonage customers can use the telephone to make voice calls from anywhere using a DSL, cable or satellite high-speed Internet connection.

⁷ Multimedia Terminal Adapter (MTA) that contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversions and has a standard telephone jack connection. Vonage Petition, p. 5.

telephone to use the service, Vonage's two-way voice communications service is "functionally no different than any other telephone service."⁸

In the Commission's 1998 report to Congress concerning VOIP and telecommunications services it stated that:

We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."⁹

The Commission also found that an entity offering a simple, transparent transmission path, without capability of providing enhanced functionality, offers "telecommunications."¹⁰ It further determined that certain protocol processing services that result in no protocol conversion to the end-user are deemed "telecommunications services".¹¹

This functional approach is consistent with Congress' intent that the classification of a service should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using the PSTN, the Internet, wireless, cable, satellite, or some other infrastructure such as VOIP. Its classification should depend on the nature of the service being offered to customers. If the customer can receive

⁸ *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance, Docket No. P-6214/C-03-108, p. 8 (September 11, 2003).

⁹ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 83, CC Docket 96-45, 13 FCC RD 11501 (rel. April 10, 1998).

¹⁰ *Id.*, ¶ 39.

¹¹ *Id.*, ¶ 50. The Act defines "telecommunications services" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used. The Act also defines "telecommunications" as the transmission between the user of information of the user's choosing, without change in the form or content of the information sent or received. The Act further defines "information service" as the "offering of capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of any such capability for the management, control or operation of the

nothing more than a pure voice transmission for a fee, the service is a “telecommunications service.”

Users of Vonage’s voice service pay a fee for the sole purpose of sending and receiving voice calls without change in form or content. From the customer’s perspective, this service and service provider is identical to traditional circuit-switched service and telecommunications carriers.¹² To the extent that certain forms of VOIP service are “telecommunications services” and to the extent the providers of those services obtain the same public switched access as other telecommunications carriers, the Commission should rule that certain VOIP providers such as Vonage are required to pay access charges and USF contributions.

III. THE COMMISSION SHOULD DENY THE PETITION BECAUSE THE U.S. DISTRICT COURT ERRED IN ITS DETERMINATION THAT VONAGE VOIP SERVICE IS AN “INFORMATION SERVICE”

On October 16, 2003, the United States District Court for the District of Minnesota issued a ruling that Vonage’s VOIP service was an “information service” and that the MPUC may not regulate Vonage as a telecommunications provider.¹³ The Court erred in its ruling.

In reviewing Vonage’s service the court relied on the following four part analysis: (1) does the provider hold itself out as providing voice telephony or facsimile transmission service; (2) does the service not require the customer to use Customer Premises Equipment (CPE) different from that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; (3) does the service allow the customer to call telephone numbers assigned in

telecommunications system or management of telecommunications service.” *Id.*, ¶ 30.

¹² *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 101, CC Docket 96-45, 13 FCC RD 11501 (rel. April 10, 1998).

¹³ *Vonage vs. Minnesota Public Service Commission*, Civil No. 03-5287 (MJD/JGL) Memorandum and Order (October 16, 2003).

accordance with the North American Numbering Plan; and (4) can the service transmit customer information without a net change in form or content.¹⁴

Using this analysis, the court incorrectly concluded that Vonage's service does not meet the second and fourth requirements. The court reasoned that the second element was not met because the use of Vonage service requires CPE that is different than what a person connected to the PSTN would use to make a telephone call. The court seems to have an image of the Vonage user sitting at their personal computer with a microphone and speakers as their only means of connection to the system. This is simply not the case. The Vonage customer uses the same CPE touchtone telephone as the ILEC customer uses.¹⁵ Vonage's underlying facilities to transmit a portion of a call may be different, but the CPE (touchtone telephone) is the same.

The court also mistakenly reasoned that because a person's voice is converted to digital or packet format and then reconverted to voice or analog format that there is a change in the protocol employed when reaching another PSTN end user's telephone that results in a net change in form or content of the information transmitted. The court's interpretation of the change from a digital format to an analog format as a violation of the fourth requirement is misplaced and incorrect.

Digital wireless carriers function in exactly the same manner as the Vonage service. They provide telecommunications services and are treated as common carriers subject to Title II pursuant to the Commission's discretion.¹⁶ Even though the form of the voice transmission

¹⁴ *Id.*, p. 13.

¹⁵ In order to use the Vonage service a customer must have a regular touchtone telephone with an industry standard RJ-11 connection jack. Once the MTA router is attached to a normal telephone and a high-speed Internet connection, a Vonage customer must only dial as they normally would on a telephone attached directly to a standard wall jack connected to the PSTN.

¹⁶ 47 C.F.R. §332.

changes greatly in its journey from the wireless user at one end and the landline PSTN user at the other end the services are still subject to Title II.

The court also overlooks the glaring fact that these calls are voice-to-voice calls. The analog information at one end is identical to the analog information received or transmitted from the other end “without net change in form or content.” Indeed, the FCC has found that “from a *functional standpoint*, users of these services obtain *only voice transmission*, rather than information services such as access to stored files.”¹⁷ The Commission has specifically determined that “routing and protocol conversion within the network does not change this conclusion, because from the user’s standpoint there is no net change in form or content.”¹⁸ The Commission has therefore tentatively concluded that these services bear the characteristics of “telecommunications services.” The reason for this classification is because there is no net change in the form or content at each end of the call and the end user cannot change the form or content after the voice message is spoken. The same is true of Vonage.

IV. IF VONAGE’S VOIP SERVICE IS DECLARED AN “INFORMATION SERVICE”, THE FCC SHOULD USE ITS PERMISSIVE AUTHORITY UNDER SECTION 254(d) AND REQUIRE VONAGE TO PAY USF CONTRIBUTIONS

Section 254(d) specifically provides the Commission with permissive authority to require “any other provider of interstate telecommunications” to contribute to universal service.¹⁹ Using this authority the Commission has required some entities that provide interstate telecommunications to end-users for a fee to contribute to the interstate universal service

¹⁷ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 89, CC Docket 96-45, 13 FCC RD 11501, 11544. (rel. April 10, 1998).

¹⁸ *Id.*, note 188.

¹⁹ The Act defines “telecommunications” as the transmission between the user of information of the user’s choosing, without change in the form or content of the information sent or received. 47 U.S.C. § 152(43).

mechanisms.²⁰ This category of providers includes entities that lease excess telecommunications capacity to end-users on a private contractual basis.

To the extent that the Commission is concerned about competitive neutrality and the sustainability of an adequate revenue base for its interstate USF mechanisms, it should require all VOIP providers to contribute on an equitable and non-discriminatory basis.²¹ The Commission's rules should keep pace with competition as competitors use different facilities and technologies as substitutes for traditional circuit switched telecommunications services. The Commission should therefore require VOIP providers to contribute to the federal universal service fund. Failing to position these providers on equal footing with existing contributors will continue to place existing contributors at a distinct competitive disadvantage and further drain revenues from the existing USF contribution revenue assessment base.

The issues raised in Vonage's petition would materially change the regulations in which providers of interstate services contribute to the USF. Exempting VOIP traffic from USF contributions and access charges would eliminate specific providers from any requirement to contribute to the universal service funding mechanisms. Such a determination would create a regulatory arbitrage incentive for all telecommunications providers to remove all traffic from the PSTN to a VOIP platform to avoid paying access charges and making universal service contributions.²² It would further increase the universal service burden on all remaining USF contributors and increase their contribution rates to a much higher level than their rates today. As a consequence the future viability of universal service would be at stake. The Commission

²⁰ The Commission has previously concluded that ISP-bound traffic "is jurisdictionally mixed and appears to be largely interstate in nature." *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd. 3689, 3703-06 ¶¶ 21-27 (1999).

²¹ 47 U.S.C. §254(d).

²² *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 98, CC Docket 96-45, 13 FCC RD 11501.

should therefore require VOIP providers to pay USF contribution regardless of whether the service is classified as a “telecommunications service” or “information service.”

V. THE FCC SHOULD REMOVE THE ESP EXEMPTION THAT ALLOWS ISPS TO AVOID PAYING ACCESS CHARGES AND USF CONTRIBUTIONS

Since 1983, the Commission has exempted ESPs from the payment of certain interstate access charges.²³ Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the PSTN.²⁴ Despite the Commission’s understanding that ISPs use interstate access services, the Commission has permitted ISPs to take service under local tariffs and avoid paying interstate access charges and USF contributions.

In 1997, the Commission reconfirmed its previous finding that that ISPs should not be required to pay interstate access charges at that time.²⁵ The Commission explained that the then existing access charge system included non-cost-based rates and inefficient rate structures.²⁶ The Commission further reasoned that ISP purchases of tariffed primary and secondary lines provided ILECs with revenues for the costs imposed on their networks by ISPs.²⁷

NTCA urges the Commission to reconsider and remove the ESP exemption that allows ISPs to avoid paying access charges and USF contributions. The non-cost based rates and inefficient rates structures that existed in 1997, no longer exist today. With the implementation

²³ This policy is known as the “ESP exemption.” See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); see also Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*).

²⁴ *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. See also *Access Charge Reform Order*, 12 FCC Rcd at 16133-35.

²⁵ *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-157, ¶¶ 344-348 (First Report and Order)(rel. May, 16, 1997).

²⁶ *Id.*

²⁷ *Id.*

of the CALLS and MAG access reform plans for non-rural and rural ILECs access charges have been reduced to historical lows and are based on cost. Moreover, primary line growth has been flat and secondary line growth has declined over the last year. At the same time ISP usage of the PSTN has continued to increase dramatically and has placed a significant and rapidly growing cost burden on ILECs without adequate compensation for ISP usage. It is time to reconsider the ISP exemption and remove regulatory arbitrage it has created.

The continued exemption of ISPs and potential exemption VOIP providers from access charges and USF contributions will only further enhance the existing regulatory arbitrage incentive for telecommunications providers to remove their traffic from the PSTN to a Internet based platform.²⁸ The exemption permits carriers like Vonage to sell their services to customers while benefiting from the free ride that ISPs receive as a result of the exemption. The ISP exemption has increased the universal service burden on all remaining USF contributors. If VOIP service is added to the list of services exempt from access charges and USF contributions, then the entire universal service funding system will be at risk of collapsing. NTCA therefore urges the Commission to remove this arbitrage incentive by eliminating the ISP exemption and requiring all ISPs and VOIP service providers to pay access charges and universal service contributions.

VI. CONCLUSION

Based on the above reasons, the Commission should deny Vonage's petition for declaratory ruling and classify its VOIP service as a "telecommunications service." In addition, the Commission should eliminate the ESP exemption for ISPs and require all ISPs and VOIP

²⁸ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 98, CC Docket 96-45, 13 FCC RD 11501.

service providers to pay all applicable access charges and make all appropriate contributions to the universal service funding mechanisms.

Respectfully submitted,

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October 27, 2003

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 03-211, DA 03-2952 was served on this 27th day of October 2003 by first-class, U.S. Mail, postage prepaid, to the following persons.

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